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UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: MCKINLEY L. BOARD, Movant.	No. ________

MOTION FOR AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE PETITION UNDER 28 U.S.C. § 2255

STATEMENT REGARDING ORAL ARGUMENT

Mr. Board respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a)(2) because argument may significantly assist the Court in determining the issues presented by this appeal.

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McKinley L. Board hereby moves for certification to file a successive petition under 28 U.S.C. § 2255(h)(2) on the basis of *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

INTRODUCTION

In *Miller*, the Supreme Court held that the Eighth Amendment forbids mandatory life-without-parole sentences for crimes committed by juveniles. *Id.* at 2469. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016), the Supreme Court recognized that *Miller*'s rule is retroactive in cases on collateral review. Mr. Board was convicted over two decades ago for his involvement in a drug conspiracy that he joined as a juvenile, and was sentenced to mandatory life imprisonment without parole by the U.S. District Court for the District of Columbia ("District Court"). Appendix ("App'x") 469-73. Because this sentence was premised in large part on his juvenile conduct, it is unconstitutional under *Miller* and *Montgomery*. Indeed, two of Mr. Board's co-defendants already received modifications of their identical life-without-parole sentences under *Miller*.[1] Mr. Board hereby seeks the same relief, and thus requests pre-filing authorization ("PFA") to file a successive

[1] On November 12, 2014, co-Defendant Andre Williams received a sentence modification from the District Court under *Miller*, App'x 337-38, and has been released from prison. On June 18, 2015, co-Defendant Gregory Thomas was similarly resentenced under *Miller*, App'x 341, and also has been released from prison.

Section 2255 petition in the District Court to vacate, set aside, or correct his unconstitutional sentence.

This Motion should be granted so the District Court can consider the merits of Mr. Board's claim. In fact, this Court already granted PFA to one of Mr. Board's co-defendants under *Miller*, holding that he made a *prima facie* showing of Section 2255's three requirements. *In re Williams*, 759 F.3d 66 (D.C. Cir. 2014). As detailed below, the same reasoning applies here and warrants PFA for Mr. Board. Namely, (i) *Miller* announced a "new rule of constitutional law," *id.* at 71; (ii) that is "retroactive in cases on collateral review," *Montgomery*, 136 S. Ct. at 732; and (iii) was previously unavailable in the late 1990s when Mr. Board's conviction was upheld and when he filed his first Section 2255 petition. *Williams*, 759 F.3d at 71. He is thus entitled to PFA.

In consideration of Mr. Board's *Miller* claim, this Court need not and should not address its merits or the timeliness of this Motion, as both are factual issues for the District Court to consider in resentencing Mr. Board. Nevertheless, even cursory glances at both issues support granting PFA. First, Mr. Board's sentence was based on the aggregate quantity of drugs attributable to the entire conspiracy, a period which included several years of juvenile conduct. Yet no findings were made about the specific quantity attributable to Mr. Board's conduct as a juvenile or adult. Thus, his sentence may well have been based solely or substantially on his juvenile conduct, which violates *Miller*. Second, although Mr. Board filed a *de facto* PFA motion more than a year after *Miller*,[2] he is entitled to have Section 2255's one-year limitations period equitably tolled because his prior counsel abandoned him during and after that one-year period.

BACKGROUND

A. Mr. Board's Convictions and Sentencing

On September 25, 1991, in one of the first D.C. prosecutions of a street gang under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Mr. Board and twenty-three other individuals were named in a 115-count indictment for operating a drug distribution ring known as the "R Street Organization." App'x 343-462. The conspiracy ran from approximately May 1983, when Mr. Board was fourteen years old, through March 1991, when Mr. Board was twenty-one. *United States v. Thomas*, 114 F.3d 228, 235-36 (D.C. Cir. 1997); App'x 506 (DOB, March 15, 1969).

Relevant here, Mr. Board was charged with, and after trial convicted of, (i) participating in a RICO in violation of 18 U.S.C. § 1962(c); (ii) conspiring to participate in a RICO in violation of 18 U.S.C. § 1962(d); (iii) conspiring to

[2] This Motion supplements Mr. Board's *pro se* filing in the District Court on December 8, 2014, styled as a motion to appoint counsel to file a successive Section 2255 petition under *Miller*. For the reasons stated in Section II.A, *infra*, Mr. Board requests that this Court construe that filing by its substance, as a motion properly before the Court requesting PFA to file a successive habeas petition.

possess and distribute drugs in violation of 21 U.S.C. §§ 841 and 846; and (iv) employing minors to distribute drugs in violation of 21 U.S.C. §§ 841 and 845. App'x 231, 346-408 (Counts 1-3), 432-33 (Count 41).[3]

Due to his role as a co-conspirator, the aggregate quantity of drugs attributable to the entire organization from 1983 to 1991, totaling the equivalent of more than 300,000 kilograms of marijuana, was attributed to Mr. Board. App'x 480-81. Under the then-mandatory Federal Sentencing Guidelines, this drug quantity established a total offense level of 43 and carried a mandatory sentence of life without parole for these Counts. U.S. Sentencing Guidelines Manual ("USSG") §§ 2D1.1(c), cmt. 5A (U.S. Sentencing Comm'n 1993). The District Court sentenced Mr. Board accordingly on March 10, 1994. App'x 263-64, 483-84. Mr. Board's and his co-defendants' convictions were later affirmed on appeal. *Thomas*, 114 F.3d at 274.

B. Mr. Board's Initial Challenges to His Sentence Under Section 2255

Mr. Board first sought relief under Section 2255 in 1998 for ineffective assistance of counsel, which the District Court denied. *United States v. Board*, No. 91-559-11, 2000 WL 12891, at *1, 6 (D.D.C. Jan. 6, 2000); App'x 289, 293, 300.

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[3] Mr. Board also was convicted of other offenses, but these are not relevant to, nor the subject of, this Motion because Mr. Board was not sentenced to life-without-parole for those offenses. *See* App'x 263-64, 463-68, 483-84.

In 2002, Mr. Board filed a *pro se* motion to reduce his sentence under 18 U.S.C. § 3582(c)(2), which the District Court construed, in substance, as a request for a successive Section 2255 petition that first required PFA. App'x 500-502. It thus transferred the motion to this Court, which denied PFA in 2006. *Id.*

C. Mr. Board Was Deceived by Counsel Who Abandoned Him and His Case After *Miller*

In early 2011, Mr. Board contacted a purported Tennessee law firm named US Freedom Foundation, LLC ("Freedom Foundation") that promised to obtain for him a sentence modification in return for a fee. Aff. of McKinley Board ("Board Aff.") ¶ 3. On February 23, 2011, Mr. Board entered into a retainer agreement with Freedom Foundation, and paid a $4,500 retainer fee. *Id.* ¶ 3-4, Ex. A. The retainer agreement stated that Freedom Foundation would "research, prepare, and draft . . . (1) a motion/petition to modify/reduce [Mr. Board's] sentence, along with all memorandum(s), response(s), replies, etc., necessary to prosecute [his] motion; and (2) provide full attorney representation by one or more of [the Firm's] attorneys throughout the proceedings." *Id.*, Ex. A at § 2; *see id.* §§ 5(a), 5(e), 6(b). The agreement also stated that if Freedom Foundation "is not successful in obtaining a [sentence] reduction," it "will refund the retainer fee." *Id.* § 5(e).

On June 25, 2012, Freedom Foundation filed a motion to reduce Mr. Board's sentence under Section 3582(c)(2).[4] App'x 503-63. *Miller* was decided the same day, yet Freedom Foundation never informed Mr. Board about *Miller*, never filed a new or supplemental brief applying *Miller* to his case, and never requested PFA from this Court for a successive petition based on *Miller*. Board Aff. ¶ 10.

In fact, after taking Mr. Board's retainer payment, Freedom Foundation abandoned him and his case. Unbeknownst to Mr. Board, Freedom Foundation ceased all legal representation after it filed the June 2012 motion for sentence reduction. *Id.* ¶¶ 6, 9. Specifically, it failed to file a reply brief in response to the Government's opposition to the motion, as required under the retainer agreement; failed to apprise Mr. Board of legal developments affecting his case, such as *Miller*; and failed to respond to repeated calls and emails from Mr. Board and his wife regarding the status of his case. *Id.* ¶ 10.

Indeed, Mr. Board's lead attorney from Freedom Foundation and the primary signatory on the motion for sentence reduction, Kenneth Scott Williamson, App'x 504, 563, was suspended from law practice in 2013 by the Supreme Court of Tennessee for "pos[ing] a threat of substantial harm to the

[4] On July 2, 2012, Mr. Board filed another successive Section 2255 premised on application of the Supreme Court's opinion in *DePierre v. United States*, 564 U.S. 70 (2011). App'x 330-31, 564-87. However, as the District Court's official mailroom stamp indicates, this motion was *received* by the District Court on June 14, 2012, *id.* at 577, which predates *Miller* on June 25, 2012. As such, this motion (for which Mr. Board did not seek PFA) is not at issue here.

public" for improperly accepting fees from prisoners seeking sentence relief and not properly withdrawing from cases after appearing. Aff. of Dustin Linden ("Linden Aff."), Ex. 1.[5] Neither Mr. Williamson nor Freedom Foundation ever informed Mr. Board of this suspension, or sought to withdraw or terminate their representation because of it, Board Aff. ¶¶ 8, 11, as required by professional rules of conduct. Tenn. S. Ct. Rule 8, Rules of Prof'l Conduct 1.4(a). Nor did Freedom Foundation ever return Mr. Board's retainer fee or inform him it was no longer working toward his sentence modification. Board Aff. ¶ 11. In fact, the District Court docket still lists Mr. Williamson as Mr. Board's "Lead Attorney." App'x 39.[6]

D. Mr. Board's Subsequent Habeas Petitions

On January 17, 2014, Mr. Board filed a *pro se* habeas petition in the District Court on the basis that his sentence was unconstitutional under a purportedly new constitutional rule. *Id.* at 588-607. However, Mr. Board never sought PFA to file this petition, and the District Court never acted on it. *Id.* at 333-41.

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[5] In addition, the Better Business Bureau recently graded Freedom Foundation an "F," citing "a serious pattern of complaint" where "this company offered to assist with [prisoner] sentence reduction[s]," and "after paying several thousands of dollars up front, the company failed to complete services as promised." Linden Aff., Exs. 2-3; *see id.*, Ex. 4 at 2 (summary) & Ex. 5 (customer complaints).

[6] Buckley Sandler LLP began representing Mr. Board in 2015 after he filed his motion to appoint counsel. Over the past year, Counsel have attempted to reach with the government an agreed-upon resolution of Mr. Board's claim, as occurred with two of Mr. Board's co-defendants, both of whom were resentenced under *Miller*. Counsel were advised two weeks prior to filing this Motion that no such resolution was possible.

In November 2014, Mr. Board learned from his co-defendant, Andre Williams, that the District Court modified Mr. Williams's life-without-parole sentence under *Miller*. Board Aff. ¶ 7; App'x 337-38. Around the same time, Mr. Board also spoke to the local counsel working with Freedom Foundation on his case, who informed him for the first time that Mr. Williamson was suspended from law practice in 2013 for unprofessional attorney conduct. Board Aff. ¶ 8. These developments, coupled with Freedom Foundation's continued failure to respond to his inquiries regarding the status of his case or inform him of the new constitutional rule under *Miller*, caused Mr. Board to fear for the first time that his lawyers abandoned his case. *Id.* ¶ 9. As such, on December 8, 2014, Mr. Board filed a motion to appoint counsel under 18 U.S.C. § 3006A to assist him in filing a Section 2255 petition under *Miller*. *Id.*; App'x 608-11. The motion incorporated the record and arguments of Mr. Williams's case. Board Aff. ¶ 9; App'x 608-09.

ARGUMENT

I. THIS COURT SHOULD GRANT MR. BOARD'S PFA MOTION

A. Standard of Review

In assessing a PFA motion, this Court must consider "whether an application for authorization to file a second Section 2255 motion in the district court makes a *prima facie* showing that the petitioner is entitled to relief." *In re Smith*, 285 F.3d

6, 7 (D.C. Cir. 2002). Section 2255(h), which incorporates 28 U.S.C. § 2244, creates "two gates" through which a prisoner must pass to obtain a ruling on the merits. *Bennett v. United States*, 119 F.3d 468, 470 (7th Cir. 1997). He must first seek PFA from the court of appeals and, if he makes a "*prima facie* showing" that he satisfies Section 2255's requirements, then it may authorize the district court to evaluate his petition's merits. *Id.* at 469; *see* 28 U.S.C. § 2244(b)(3)(C); *Smith*, 285 F.3d at 7 (district court hears merits of § 2255 motion). In light of this dual Freview structure, the initial "*prima facie* showing" is "not a difficult standard to meet," *In re McDonald*, 514 F.3d 539, 544 (6th Cir. 2008); but, rather, requires "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Bennett*, 119 F. 3d at 469.

B. This Motion Is Premised on *Miller*, Which this Court Previously Held Satisfies Section 2255's Elements on a *Prima Facie* Basis

A petitioner seeking PFA under Section 2255 must establish on a *prima facie* basis that his PFA motion is premised on a "[1] a new rule of constitutional law, [2] made retroactive to cases on collateral review by the Supreme Court, [3] that was previously unavailable." 28 U.S.C. § 2255(h)(2). Here, Mr. Board premises this Motion on the Supreme Court's holding in *Miller* that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment." 132 S. Ct. at 2460. As this Court concluded before with

Mr. Board's co-defendant, *Miller* satisfies Section 2255(h)(2) on a *prima facie* basis. *Williams*, 759 F.3d at 71.

This Motion satisfies the first element because *Miller* announced a "new rule of constitutional law." *Id.* It satisfies the second element because in 2016 the Supreme Court held that *Miller* is "retroactive in cases on collateral review." *Montgomery*, 136 S. Ct. at 732; *see also Williams*, 759 F.3d at 71. And the third element is met because relief under *Miller* was previously unavailable to Mr. Board "because both at the time of his final conviction in 1997 and his first § 2255 petition in 1998, mandatory life-without-parole sentences for juvenile offenders had not yet been declared unconstitutional." *Williams*, 759 F.3d at 71; App'x 282 (dkt. 1652) (final conviction in 1997); *id.* 289 (dkt. 1738) (first § 2255 petition in 1998). Thus, as in *Williams*, this Court should grant this Motion so Mr. Board can file a successive habeas petition and have the merits of his *Miller* claim heard.[7]

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[7] Doing so comports with recent Supreme and Circuit Court orders vacating and remanding decisions involving life-without-parole sentences for juvenile defendants so lower courts could consider their juvenile statuses, as required under *Miller* and *Montgomery*. *See, e.g., Tatum v. Arizona*, No. 15-8850, 137 S. Ct. 11, 2016 WL 1381849, at *1 (U.S. Oct. 31, 2016) (Sotomayor, J., concurring) ("A grant, vacate, and remand" of cases involving petitioners sentenced to life-without-parole for juvenile crimes "in light of *Montgomery* permits the lower courts to consider whether these petitioners' sentences comply" with *Miller*.); *Evans-Garcia v. United States*, 744 F.3d 235 (1st Cir. 2014) (granting PFA under *Miller*); *In re Pendleton*, 732 F.3d 280 (3d Cir. 2013) (same); *In re Simpson*, 555 F. App'x 369, 371 & n.2, 372 (5th Cir. 2014) (same).

C. Although Not Required at this Stage, Even a Cursory Glance at the Merits of Mr. Board's *Miller* Claim Supports Granting PFA

In evaluating this Motion, this Court's "sole task is to determine whether [Mr. Board] has made a *prima facie* showing that his *Miller* motion satisfies the necessary requirements of § 2255(h)," *Williams*, 759 F.3d at 71, such that the District Court can consider the merits—a fact-intensive analysis—at the next stage. *Id.* at 70-71 ("[H]ow [the new rule] applies to a case concerning a crime that straddled the age of majority, is a question for the district court in the first instance, not the court of appeals."); *see Ochoa v. Sirmons*, 485 F.3d 538, 545 (10th Cir. 2007) (district court better suited to consider "fact-intensive" merits). Accordingly, this Court should decline to consider the merits of Mr. Board's *Miller* claim because the District Court is the proper venue. Nevertheless, even if the merits are considered, they dictate that Mr. Board's sentence is unconstitutional.

1. Mr. Board Received a Mandatory Life-Without-Parole Sentence Without Any Consideration of His Juvenile Status

The District Court determined that, due to the quantity of drugs attributable to Mr. Board as a member of the conspiracy, the Sentencing Guidelines mandated a life-without-parole sentence. App'x 479-81, 483-84; *see United States v. Booker*, 543 U.S. 220, 233 (2005) (Guidelines "mandatory and binding on all judges"). In rendering this sentence, the District Court could not consider Mr. Board's age because youth was rejected by the Sentencing Commission as a mitigating factor.[8] Indeed, this restriction was noted by the District Court during Mr. Board's sentencing hearing. *See* App'x 479-80 ("There's not a lot to talk about from Mr. Board's position, unfortunately, based upon the mandatory sentence that has to be imposed in this case."). Thus, Mr. Board received a mandatory life-without-parole sentence where his youth was not a sentencing consideration.

2. Mr. Board's Sentence Was Based on Juvenile Conduct in Violation of *Miller*

Miller held that sentencing schemes mandating life-without-parole sentences for juvenile conduct are unconstitutional. 132 S. Ct. at 2460. Because this rule turns on the status of the offender *at the time* the wrongful conduct occurred, *id.* (applying holding to "those under the age of 18 at the time of their crimes"), and because the Supreme Court made no exception for the type of crime involved, *Miller* applies equally to such sentencing for *all* crimes. This includes continuing crimes (like Mr. Board's conspiracy convictions) that may straddle the age of a defendant's majority.

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[8] *See* 18 U.S.C. § 3553(b)(1) (2010) (courts can only consider factors from "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission"); USSG, § 5H1.1 ("Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."); *Miller*, 132 S. Ct. at 2458 (pre-*Booker* sentencing scheme "prevent[ed] the sentencer from considering youth").

With continuing crimes like conspiracy, one can be guilty by agreeing to join the conspiracy, but, once having joined, cannot extinguish liability through inaction. *Thomas*, 114 F.3d at 262. As such, a person can be found guilty of a drug conspiracy that he foolishly joined as a child and remained in as an adult. But his agreement to join is no less the result of the hallmark psychological features of youth that create "diminished [juvenile] culpability." *Miller*, 132 S. Ct. at 2464. Thus, to the extent Mr. Board's sentence derived from his juvenile conduct in the conspiracy—or the conduct of co-conspirators attributed to Mr. Board during the time he was a juvenile—that sentence is unconstitutional under *Miller* even if those crimes continued when Mr. Board was an adult.

In this context, even a cursory glance at the merits of Mr. Board's *Miller* claim shows that his sentence is unconstitutional. His sentence derived almost exclusively from the aggregate quantity of drugs distributed by the entire organization from its beginning in 1983—when he was fourteen years old—to when it ended in 1991. Mr. Board turned eighteen in 1987. Yet, the District Court made no finding as to the portion of drugs attributable to Mr. Board specifically or the portion attributable to him *while he was an adult*.[9] Thus, Mr. Board's life-

[9] During the sentencing hearing, Mr. Board's attorney noted that because he was convicted of RICO violations, which aggregated the conspiracy's drug quantities to Mr. Board, there was no point in asking the District Court to determine exactly what quantity of drugs was attributable to Mr. Board individually. App'x 476-77 ("If it weren't for counts 1 and 2 . . . we would probably be making the argument

without-parole sentence may well have resulted, solely or substantially, from the quantity of drugs attributable to him as a juvenile. As such, his sentence is unconstitutional under *Miller*, absent a hearing in the District Court to either disaggregate the drug quantity attributable to Mr. Board as a juvenile versus an adult or consider Mr. Board's youth as a sentencing factor.

II. THIS PFA MOTION IS TIMELY

A. This Court Should Consider Mr. Board's *Pro Se* Motion to Appoint Counsel as a Successive Section 2255 Petition

On December 8, 2014, Mr. Board filed in the District Court a *pro se* motion to appoint counsel, under 18 U.S.C. § 3006A, to help him file a successive Section 2255 petition under *Miller*. App'x 608-11. The motion incorporated the record and arguments of Mr. Board's co-defendant, Mr. Williams, *id.* at 608-09, who, on November 12, 2014, had his life-without-parole sentence modified by the District Court based on a successive habeas petition under *Miller*. *Id.* at 337-38.

Mr. Board's December 2014 motion should have been transferred to this Court as a *de facto* PFA motion under Section 2255. That is because a district court lacks jurisdiction to consider a request for the appointment of counsel to file a habeas petition if the defendant did not first obtain PFA to file the petition itself. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) ("When a statute removes

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that 300,000 kilograms of marijuana . . . should not be attributable to Mr. Board. However, since we are [left] with counts 1 and 2, that would be an unnecessary argument to make.").

jurisdiction" to file a successive habeas petition "it must by necessity also remove from the district courts' consideration motions for the appointment of counsel to file the particular claims over which the district courts lack jurisdiction.").[10] As a result, the District Court had only two options: dismiss the motion for lack of jurisdiction or construe it as a PFA request and transfer it to this Court. 28 U.S.C. § 1631 ("[I]n the interest of justice," a district court can transfer matters over which it has no jurisdiction to "any other such court in which the action or appeal could have been brought."); *Key*, 205 F.3d at 774 (without PFA, successive habeas petition can be dismissed for lack of jurisdiction). As a *pro se* movant, Mr. Board reasonably expected that the District Court would do the latter, just as it had with his November 2002 *pro se* motion under Section 3582(c)(2), which the District Court construed as a PFA request and transferred to this Court. App'x 500-501; *see United States v. Palmer*, 296 F.3d 1135, 1143 (D.C. Cir. 2002) ("The court's recharacterization of the Rule 33 Motion [as a 2255 petition] follows the well-established practice of construing a *pro se* party's pleadings liberally."); *United States v. Naranjo*, No. 93-418-04, 2014 WL 5408414, at *1 (D.D.C. Oct. 24, 2014) ("Though the defendant does not label it as such, this Court construes his motion as a second 2255 petition."); *United States v. Tchibassa*, 762 F. Supp. 2d 3, 7 (D.D.C.

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[10] *See also Salem v. Warren*, No. 2:09-CV-12157, 2009 WL 3125554, at *3 (E.D. Mich. Sept. 28, 2009) (same); *Pruitt v. South Carolina*, No. 6:08-1535, 2008 WL 2544402, at *2 (D.S.C. June 25, 2008) (same).

2011) ("Regardless of how a *pro se* prisoner styles his motion, a court must review the motion based on its substance.").

Although the transfer never occurred, Mr. Board respectfully requests that this Court construe his December 2014 *pro se* motion to appoint counsel by its substance—as a PFA motion to file a successive Section 2255 petition under *Miller*. *See In re Demps*, 213 F.3d 1357, 1358 (11th Cir. 2000) ("treat[ing] [petitioner's] motion for appointment of counsel as an application for leave to file a successive habeas petition" because petitioner filed previous habeas petitions). Accordingly, this Motion supplements the December 2014 motion and is now before this Court.

B. Mr. Board Has Made a *Prima Facie* Showing of Equitable Tolling and His PFA Petition Is Thus Timely

A petitioner seeking to file a successive habeas petition must do so within one year of the date on which the Supreme Court recognized the new constitutional right at issue. 28 U.S.C. § 2255(f)(3). Here, Mr. Board filed his *de facto* PFA motion on December 8, 2014, more than a year after *Miller* was decided on June 25, 2012. However, Section 2255(f)(3)'s one-year limitation period should be equitably tolled.

A habeas petitioner is entitled to equitable tolling if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 648 (2010). "Serious instances of attorney misconduct," such as an attorney who abandons his client, can constitute an extraordinary circumstance. *Id.* at 652; *Maples v. Thomas*, 132 S. Ct. 912, 924 (2012) ("[A] client cannot be charged with the acts or omissions of an attorney who has abandoned him."); *Baldayaque v. United States*, 338 F.3d 145, 152-53 (2d Cir. 2003) (egregious attorney conduct can constitute extraordinary circumstances that toll one-year limitations period).

Here, Mr. Board is entitled to equitable tolling because, after taking thousands of dollars from him in upfront fees, his attorneys at Freedom Foundation abandoned him and his case at its most critical moment—immediately after *Miller* was decided on June 25, 2012. Freedom Foundation promised Mr. Board, an inmate of more than two decades, a sentence modification and "full attorney representation." Board Aff. ¶ 3, Ex. A. Although Mr. Board paid the $4,500 retainer fee, Freedom Foundation disappeared after filing his motion for a sentence modification on June 25, 2012. *Id.* ¶¶ 3-4, 6, Ex. A. It did not file a reply brief in support of the motion, it did not file any additional briefing based on *Miller*, and it did not request PFA from this Court to file a successive habeas petition based on *Miller*. *Id.* ¶ 10; App'x 330-42; *see Spitsyn v. Moore*, 345 F.3d 796, 801 (9th Cir. 2003) (attorney's "fail[ure] to prepare and file a [habeas] petition," despite being hired "nearly a full year in advance of the deadline," was "sufficiently egregious to justify equitable tolling"). It also did not inform Mr. Board about *Miller*, nor did it respond to repeated calls and emails from Mr. Board and his wife regarding the status of his case, or inform Mr. Board that his lead counsel, Mr. Williamson, was suspended from law practice. Board Aff. ¶¶ 6, 8, 11; Tenn. S. Ct. Rule 8, Rules of Prof'l Conduct 1.4(a)(3) ("A lawyer shall keep the client reasonably informed about the status of the matter."); *Holland*, 560 U.S. at 659 ("[C]ounsel's near-total failure to communicate with petitioner or to respond to [the client's] many inquiries and requests" can "suffice to establish extraordinary circumstances beyond [petitioner's] control"); *Maples*, 132 S. Ct. at 923 (same); *Baldayaque*, 338 F.3d at 152-53 (failure to communicate with client about case status, or perform basic legal research, can constitute extraordinary circumstances).

As stated, Mr. Board and his wife continuously called and emailed Freedom Foundation about the status of his case from June 2012 through 2014, but never received a response. Board Aff. ¶ 6; *see Spitsyn*, 345 F.3d at 801-02 ("reasonable attempts to contact" abandoning attorney can constitute reasonable diligence). This, along with learning that his co-defendant successfully reduced his mandatory life-without-parole sentence under *Miller*, and learning from local counsel that Mr. Williamson was suspended from law practice, both in November 2014, caused Mr. Board to fear for the first time that Freedom Foundation abandoned him. Board Aff. ¶¶ 7-9. As a result, Mr. Board immediately filed his *de facto* PFA motion on

December 8, 2014 in the District Court. *Id.* ¶ 9; App'x 608-11; *see Holland*, 560 U.S. at 653 (petitioner writing letters to abandoning attorney and filing *pro se* habeas petition promptly after discovering ability to do so can constitute reasonable diligence).

Mr. Board's belief that Freedom Foundation represented him through 2014 was reasonable because, as an unsophisticated inmate without full access to outside information, he was unaware that Freedom Foundation was a fraudulent enterprise that preyed on vulnerable prisoners. Board Aff. ¶ 11. He also was unaware of its "serious pattern" of accepting upfront fees and failing to obtain promised-for sentencing relief, Linden Aff., Exs. 2-3, or that the Supreme Court of Tennessee found that his attorney, Mr. Williamson, "pose[d] a threat of substantial harm to the public" for similar misconduct. *Id.*, Ex. 1; *see id.* Exs. 4-5; Board Aff. ¶¶ 8, 11. Mr. Board also reasonably believed Freedom Foundation represented him through 2014 because it did not terminate its representation, seek permission to withdraw from the case, attempt to secure substitute counsel, or refund his retainer fee. Board Aff. ¶ 11. Mr. Board was also trusting of the firm's promises to provide "full attorney representation" throughout the proceedings. *Id.* Indeed, the District Court docket still lists Mr. Williamson as his "Lead Attorney." App'x 39.

This echoes the petitioner's experience in *Maples*, where the Supreme Court held that he was "left unrepresented at a critical time" because his lawyers "abandoned the case without leave of court, without informing [him] they could no longer represent him, and without securing any recorded substitution of counsel." 132 S. Ct. at 917. Because Mr. Board's previous attorneys similarly abandoned him and his case, and he diligently filed a *pro se* habeas petition promptly after discovering the abandonment, Section 2255(f)(3)'s statute of limitations should be equitably tolled such that his *de facto* PFA motion is *prima facie* timely.

C. To the Extent There Are Any Factual Issues Concerning the Timeliness of Mr. Board's Petition, This Court Should Defer the Fact-Intensive Timeliness Question to the District Court for Review of Mr. Board's Equitable Tolling Claim

Even though Mr. Board's petition demonstrates that Section 2255's one-year limitation should be equitably tolled, to the extent there are any factual questions on this issue, this Court should decline to exercise its discretion to consider whether Mr. Board has made a *prima facie* showing of timeliness. This is because his "petition has not yet been considered by a district court," and thus this Court "does not have a developed record" to determine whether equitable tolling is warranted. *McDonald*, 514 F.3d at 543.

Although this Court exercised its discretion on the timeliness issue in *Williams*, that case involved a straightforward application of the prison-mailbox rule where "the government [] effectively conceded that Williams' motion was *prima facie* timely." 759 F.3d at 69. Not so here. Indeed, this inquiry is significantly more fact intensive, where the timeliness and tolling of Mr. Board's filing turns on determinations of, among other things, whether and when his attorneys abandoned him; what promises they made; Mr. Board's sophistication and reliance; and his response to his attorneys' abandonment—all of which are absent from the record. Further factual development can only occur in the District Court. *See Holland*, 560 U.S. at 653 (remanding case to district court to determine if facts constitute abandonment and diligence); *Spitsyn*, 345 F.3d at 802 (district court to determine diligence on remand when "[t]he existing record does not clearly answer that question").

CONCLUSION

For the reasons set forth above, this Court should grant this Motion.

Date: March 20, 2017

Respectfully submitted,

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Counsel of Record for Movant McKinley L. Board

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d) and 32(a)(5)-(6) and District of Columbia Circuit Rule of Court 27(a)(2), I hereby certify the following:

The foregoing Motion For Authorization To File A Second Or Successive Petition Under 28 U.S.C. § 2255 does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 27(d)(2)(A). This Motion was prepared using Microsoft Word 2010 and contains 5,198 words of proportionally spaced text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). The typeface is Times New Roman, 14-point font.

Caitlin M. Kasmar

Caitlin M. Kasmar

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed with the Court on March 20, 2017 will be sent via Federal Express Priority Overnight to the following persons:

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Caitlin M. Kasmar

ADDENDUM A

CERTIFICATE OF PARTIES

The parties to this matter are the United States, which prosecuted the underlying criminal case, and McKinley Board, who was the defendant in the underlying criminal case. There were no intervenors or amici in the underlying criminal case, and there are none at this time in this proceeding.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: MCKINLEY L. BOARD, Movant.	No. ________

AFFIDAVIT OF MCKINLEY L. BOARD IN SUPPORT OF MOTION FOR AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE PETITION UNDER 28 U.S.C. § 2255

I, McKinley L. Board, declare the following:

1. I make this Affidavit in support of my Motion for Authorization to File a Second or Successive Petition under 28 U.S.C. § 2255. I am over 21 years of age. The statements set forth in this Affidavit are based upon my own experiences. Accordingly, I have personal knowledge of the facts state herein and, if asked to do so, I could and would competently testify thereto.

2. I am currently an inmate at United States Penitentiary Allenwood in Allenwood, Pennsylvania, serving a sentence of life in prison without the possibility of parole for crimes that I committed more than 25 years ago.

3. In or around early 2011, I learned from another prison inmate about a Tennessee law firm named US Freedom Foundation, LLC ("Freedom Foundation") that allegedly specialized in representing prisoners seeking to obtain sentence modifications. I contacted the firm by telephone to discuss the possibility of retaining it for the purpose of obtaining a sentence modification. During that initial telephone call, I spoke to a Freedom Foundation representative named Bill Green. Mr. Green told me Freedom Foundation offered several sentence modification options to its clients, which varied by depth of representation and cost. One such option involved limited legal representation that involved only filing a motion for a sentence modification but no further representation, and which cost $1,800. Another option involved "full

representation," which included drafting legal briefs, reply briefs in support thereof, appearing at all necessary court hearings in support of my sentence modification. Mr. Green also told me that if Freedom Foundation was unable to secure the promised-for sentence modification, the firm would refund my retainer fee in full. Upon hearing this promise, I trusted Freedom Foundation and its alleged expertise, and therefore opted to purchase the more expensive package of full legal representation for $4,500.

4. Attached hereto as **Exhibit A** is a true and correct copy of the retainer agreement I entered into with Freedom Foundation, dated February 23, 2011, containing many of the terms in the preceding paragraph.

5. On June 25, 2012, Freedom Foundation filed a motion for sentence reduction on my behalf in the District Court ("Motion"). Joint App'x ("J.A.") 538-98.

6. After Freedom Foundation filed the Motion, I never heard from the firm or its attorneys again. Over the course of the next two years, I made repeated attempts to contact my attorneys at Freedom Foundation at the same phone number and email address I previously used to contact the firm. Over the same period, I also caused my wife, Khalisah Board, to repeatedly call Freedom Foundation regarding the status of my case. In total, from approximately June 2012 through November 2014, my wife and I called Freedom Foundation several dozen times

and sent numerous emails to inquire about the status of my case and obtain legal advice. However, we never received a response from Freedom Foundation, as no one from the firm ever answered the telephone, responded to our emails, or otherwise contacted myself or my wife regarding my case. Eventually, in late 2014, someone answered my telephone call to Freedom Foundation only to reveal that the firm could no longer be reached at that number.

7. In or around November 2014, my co-defendant, Andre P. Williams, informed me that the District Court modified his life-without-parole sentence of under *Miller*.

8. In or around November 2014, I called Robert S. Becker, Esq., the local counsel working with Freedom Foundation on my case and the second signatory on the Motion. *See* Mot. at 11. Mr. Becker informed me for the first time that the lead Freedom Foundation attorney assigned to my case, and the primary signatory on the Motion, *see id.*, Kenneth Scott Williamson, Esq., was suspended from law practice in 2013. Mr. Becker also denied he was my local counsel, instead stating that he was only a "sponsor" for Mr. Williamson and did not know much about my case.

9. After my conversation with Mr. Becker, coupled with the issues described in Paragraphs 6 through 8 above, I realized for the first time that Freedom Foundation abandoned their representation of me after they filed the

Motion in June 2012. As a result, on December 8, 2014, I filed a motion to appoint counsel to assist me in filing a successive 28 U.S.C. § 2255 petition under *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which incorporated the record and arguments of my co-defendant, Mr. Williams. J.A. 486-89.

10. Freedom Foundation never filed a reply brief in support of the Motion, despite the Government's opposition and the retainer agreement requiring Freedom Foundation to do so; it never informed me about the Supreme Court's opinion in *Miller*; it never filed (or consulted me about filing) a new or supplemental brief applying *Miller* to my case; it never requested appellate court authorization on my behalf (or consulted me about requesting such authorization) to file a second or successive petition under 28 U.S.C. § 2255 based on *Miller*; and it otherwise failed to apprise me of any legal developments affecting my case, including *Miller*. Freedom Foundation also never informed me that, under *Miller*, the District Court modified the life-without-parole sentence of my co-defendant, Mr. Williams.

11. Prior to November 2014, I believed Freedom Foundation continued to represent me pursuant to the terms of our retainer agreement. I trusted the firm based on the promises from Mr. Green and in the retainer agreement that the firm would provide me with "full attorney representation" in exchange for the $4,500 retainer fee that I paid. Prior to my conversation with Mr. Becker in November

2014, I did not know my attorney, Mr. Williamson, was suspended from practicing law, nor did I know about the Tennessee Supreme Court's findings about his unprofessional conduct toward other prisoners. I also believed Freedom Foundation continued to represent me through 2014 because it did not inform me about Mr. Williamson's suspension, that it was no longer working toward my sentence modification, or that it was otherwise terminating its representation. The firm also did not seek permission to withdraw from my case, attempt to secure substitute counsel, or refund my retainer fee.

In accordance with 28 U.S.C. § 1746, I state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 6th day of September, 2016.

McKinley L. Board

EXHIBIT A

US FREEDOM FOUNDATION, LLC

Fighting for your freedom

Mail Address: P.O. Box 232 Madison, TN. 37116

Phone (615) 865-0919 Fax (615) 865-0921

Retainer Agreement (Agreement)

1. This **Agreement**, entered into this **23rd day of February, 2011**, by and between **McKinley Board** and **US Freedom Foundation** (USFF). Each a party, collectively, the parties.

2. **Whereas**, McKinley Board desires to retain the services of USFF in connection with the pursuit of a challenge his federal conviction and/or sentence, more specifically described as follows:

> Under the supervision of USFF's licensed legal counsel(s), USFF will: (1) research, prepare, and draft the following for Mr. McKinley Board, Bureau of Prisons No. 15064-016: (1) a motion/petition to modify/reduce his sentence, along with all memorandum(s), response(s), replies, etc., necessary to prosecute Mr. Board's motion; and (2) provide full attorney representation by one or more of USFF's attorneys throughout these proceedings. Although any pleadings/motions, etc., associated with this agreement will be agreed upon by both parties, USFF reserves the right to make the final determination of the content of any pleadings/motions, etc., that it prepares for Mr. Board based upon the direction and instruction of USFF's legal counsel.

Now Therefore, the parties agree as follows:

3. In exchange for payment of a retainer, to USFF from Mr. McKinley Board in the amount of $4,500.00, USFF agrees to complete the service(s) set forth in Section 2 above.

4. The service(s) set forth in Section 2 will be completed promptly upon Mr. Board's fulfillment of his obligations under this Agreement, including, but not limited to, the receipt by USFF from Mr. Board of the retainer fee down payment and the receipt by USFF of the documentation set forth in Section 5, subsection c, below.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: MCKINLEY L. BOARD,

Movant.

No. ________

AFFIDAVIT OF DUSTIN A. LINDEN, ESQ., IN SUPPORT OF MOTION FOR AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE PETITION UNDER 28 U.S.C. § 2255

I, Dustin A. Linden, Esq., declare the following:

1. I make this Affidavit in support of McKinley L. Board's Motion for Authorization to File a Second or Successive Petition under 28 U.S.C. § 2255. I am over 21 years of age and an associate at the law firm Buckley Sandler LLP. I have personal knowledge of the facts state herein and, if asked to do so, I could and would competently testify thereto.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the September 2013 Supreme Court of Tennessee's Order of Temporary Suspension, and accompanying public notice by the Board of Professional Responsibility of the Supreme Court of Tennessee, regarding the suspension of attorney Kenneth Scott Williamson. I caused Exhibit 1 to be downloaded from the Tennessee Bar Association's website on March 20, 2017 at the following URL: http://www.tba.org/sites/default/files/williamsonk_suspend_091013.pdf.

3. Attached hereto as **Exhibits 2 through 5**, respectively, are true and correct copies of the Better Business Bureau's rating and business review of the law firm US Freedom Foundation, LLC, and accompanying customer complaints. I caused Exhibits 2 through 5 to be downloaded from the Better Business Bureau's website on the following dates at the following URLs:

- Exhibit 2: http://www.bbb.org/nashville/business-reviews/paralegals/us-freedom-foundation-in-madison-tn-37044320 (December 3, 2016)

- Exhibit 3: https://www.bbb.org/nashville/business-reviews/paralegals/us-freedom-foundation-in-madison-tn-37044320/Alerts-and-Actions (December 3, 2016)
- Exhibit 4: http://www.bbb.org/nashville/news-events/bbb-in-the-news/2014/06/misleading-advertising-products-and-services-middle-tennessee-can-do-without-june-2014/ (March 20, 2017)
- Exhibit 5: https://www.bbb.org/nashville/business-reviews/paralegals/us-freedom-foundation-in-madison-tn-37044320/reviews-and-complaints (December 3, 2016)

In accordance with 28 U.S.C. § 1746, I state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 20th day of March, 2017.

Dustin A. Linden

Dustin A. Linden, Esq.

EXHIBIT 1

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

10 CADILLAC DRIVE, SUITE 220
BRENTWOOD, TENNESSEE 37027
TELEPHONE: (615) 361-7500
(800) 486-5714
FAX: (615) 367-2480
E-MAIL: ethics@tbpr.org
Website: www.tbpr.org

RELEASE OF INFORMATION
RE: KENNETH SCOTT WILLIAMSON - BPR# 28802
CONTACT: KRISANN HODGES
BOARD OF PROFESSIONAL RESPONSIBILITY
615-361-7500

September 9, 2013

SUMNER COUNTY LAWYER TEMPORARILY SUSPENDED

On September 6, 2013, the Supreme Court of Tennessee issued an Order temporarily suspending Kenneth Scott Williamson from the practice of law upon finding that Mr. Williamson's continued practice of law poses a threat of substantial harm to the public. In late 2010, Mr. Williamson began working with the U.S. Freedom Foundation, a business purporting to assist federal prisoners with legal services. Mr. Williamson drafted pleadings and entered appearances in federal courts on behalf of U.S. Freedom Foundation clients. Mr. Williamson alleges he left Freedom Foundation in September, 2011; however, Freedom Foundation has continued to accept fees from clients and file pleadings in Federal Court under Mr. Williamson's signature. Mr. Williamson has not withdrawn from cases in which he entered appearances. Section 4.3 of Tennessee Supreme Court Rule 9 provides for the immediate summary suspension of an attorney's license to practice law in cases where it has been demonstrated that the attorney poses a threat of substantial harm to the public.

Effective September 6, 2013, Mr. Williamson is precluded from accepting any new cases and he must cease representing existing clients by October 6, 2013. After October 6, 2013, Mr. Williamson shall not use any indicia of lawyer, legal assistant, or law clerk nor maintain a presence where the practice of law is conducted.

Mr. Williamson must notify all clients being represented in pending matters, as well as co-counsel and opposing counsel of the Supreme Court's Order suspending his law license. Section 18 of Supreme Court Rule 9 requires Mr. Williamson to deliver to all clients any papers or property to which they are entitled.

This suspension remains in effect until dissolution or modification by the Supreme Court. Mr. Williamson may for good cause request dissolution or modification of the suspension by petition to the Supreme Court.

Williamson 2249-6 rel.doc

PLEASE NOTE

YOU MAY SUBSCRIBE TO RECEIVE INFORMATIONAL RELEASES, FORMAL ETHICS OPINIONS, NEWSLETTERS AND ANNUAL REPORTS ELECTRONICALLY BY SIGNING IN AT THE BOARD'S WEBSITE

www.tbpr.org/Subscriptions

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: KENNETH SCOTT WILLIAMSON, BPR #28802
An Attorney Licensed to Practice Law in Tennessee
(Sumner County)

FILED
SEP - 6 2013
Clerk of the Courts

No. M2013-01983-SC-BAR-BP
BOPR No. 2013-2249-6-KH(4.3)

ORDER OF TEMPORARY SUSPENSION

This matter is before the Court on a Petition of the Board of Professional Responsibility of the Supreme Court of Tennessee, by and through Disciplinary Counsel, for the temporary suspension of Kenneth Scott Williamson from the practice of law, pursuant to Tenn. Sup. Ct. R. 9, § 4.3. The Petition has been authorized by the Chair of the Board of Professional Responsibility and is supported by the affidavits of Preston Shipp, Disciplinary Counsel, Patricia Constantino, Kim Hing, and Amy Girvin.

Based upon the Petition and the supporting Affidavits, the Court finds Kenneth Scott Williamson, Respondent, poses a threat of substantial harm to the public.

It is therefore, ordered, adjudged and decreed by the Court that:

1. Kenneth Scott Williamson is hereby temporarily suspended from the practice of law as provided in Tenn. Sup. Ct. R. 9, § 4.3.

2. Kenneth Scott Williamson shall comply with Tenn. Sup. Ct. R. 9 in all respects and particularly as provided in Tenn. Sup. Ct. R. 9, § 18.

3. Kenneth Scott Williamson may make application for dissolution or modification of this Order as provided in Tenn. Sup. Ct. R. 9, § 4.3.

4. The Board of Professional Responsibility shall cause notice of this suspension of Kenneth Scott Williamson to be published as required by Tenn. Sup. Ct. R. 9, § 18.10.

FOR THE COURT:

Cornelia A. Clark
CORNELIA A. CLARK, JUSTICE

EXHIBIT 2

45 counties of Middle Tennessee and Southern Kentucky

Change Location

enu

THIS BUSINESS IS NOT BBB ACCREDITED

US FREEDOM FOUNDATION, LLC

F

REASON FOR RATING

BBB files contain a serious pattern of complaint from consumers alleging this company offered to assist with sentence reduction or other court related services for p... Read More (https://www.bbb.org/nashville/business-reviews/paralegals/us-freedom-foundation-in-madison-tn-37044320/Alerts-and-Actions)

BUSINESS ALERT

This company's business practices resulted in a BBB media release titled "Misleading Advertising, Products and Services that Middle Tennessee Consumers and Businesse... Read More (https://www.bbb.org/nashville/business-reviews/paralegals/us-freedom-foundation-in-madison-tn-37044320/Alerts-and-Actions)

Overview

BBB Reports On:

BBB Business Profiles may not be reproduced for sales or promotional purposes.

Trademarks (http://www.bbb.org/bbb-trademark-information/)

Privacy Policy (http://www.bbb.org/nashville/get-to-know-us/privacy-policy/)

Fight Phishing (http://www.bbb.org/nashville/get-consumer-help/fight-phishing/)

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EXHIBIT 3

45 counties of Middle Tennessee and Southern Kentucky

Change Location

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THIS BUSINESS IS NOT BBB ACCREDITED

US FREEDOM FOUNDATION, LLC

Alerts & Actions

REASON FOR RATING

BBB files contain a serious pattern of complaint from consumers alleging this company offered to assist with sentence reduction or other court related services for prisoners; however, after paying several thousands of dollars up front, the company failed to complete services as promised.

In February 2014, BBB sent certified correspondence to the company requesting resolutions to the complaints as well as their cooperation in eliminating the pattern; however, BBB's mail has been returned as "Box Closed."

BUSINESS ALERT

This company's business practices resulted in a BBB media release titled "Misleading Advertising, Products and Services that Middle Tennessee Consumers and Businesses Can Do Without." Click here to view it: http://www.bbb.org/nashville/news-events/bbb-in-the-news/2014/06/misleading-advertising-products-and-services-middle-tennessee-can-do-without-june-2014/ (http://www.bbb.org/nashville/news-events/bbb-in-the-news/2014/06/misleading-advertising-products-and-services-middle-tennessee-can-do-without-june-2014/)

BBB Business Profiles may not be reproduced for sales or promotional purposes.

Privacy Policy (http://www.bbb.org/nashville/get-to-know-us/privacy-policy/)

Fight Phishing (http://www.bbb.org/nashville/get-consumer-help/fight-phishing/)

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EXHIBIT 4

45 counties of Middle Tennessee and Southern Kentucky

Change Location

Home (http://www.bbb.org/nashville/) / News & Events (http://www.bbb.org/nashville/news-events/) / Misleading Advertising Products and Services Middle Tennessee Can Do Without - June 2014 (http://www.bbb.org/nashville/news-events/bbb-in-the-news/2014/06/misleading-advertising-products-and-services-middle-tennessee-can-do-without-june-2014/)

Misleading Advertising Products and Services Middle Tennessee Can Do Without - June 2014

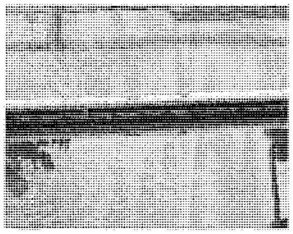
Like 8 Share G+ Share 0 Share Tweet

June 09, 2014

Your Better Business Bureau has identified the following businesses as offering services and products, which have resulted in numerous complaints alleging misleading ads/offers, unsatisfactory services and misrepresented products.

Each business identified in this BBB Accredited Business Member/Media Update has been contacted by BBB concerning their business practices, unresolved customer complaints, and failure to discontinue the cause of customer complaints.

Katie's Pools (http://www.bbb.org/nashville/business-reviews/swimming-pool-contractors-dealers-design/katies-pools-in-new-johnsonville-tn-2124379) – BBB Rating: F
931.264.8170 (formerly 931.535.3114)
1024 Broadway Ave, New Johnsonville, TN 37134
www.facebook.com/katiespools/info

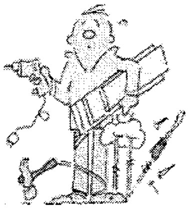


There are many different ways that swimming pool ownership can improve happiness, health, and family social time, but several customers of Katie's Pools tell BBB they haven't had the luxury of enjoying these benefits.

Complaints on file with BBB allege consumers paid thousands to this company for pool installation and/or pool repairs, but the company failed to complete the job as promised. One consumer paid the company $16,500.00 to install a pool, but after learning of the all the problems the company was causing, they decided to cancel the contract and seek a refund. The company, however, refused to refund monies paid, failed to complete work as promised, and has ignored BBB's attempts to assist with the resolutions of all complaints on file. This is one pool company that will "drain" your wallet and summertime happiness.

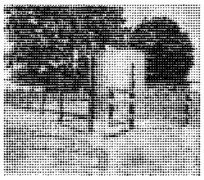
A-1 Exteriors (http://www.bbb.org/nashville/business-reviews/roofing-contractors/a-1-exteriors-in-mount-pleasant-tn-37069531)– BBB Rating: F
931.398-5154 – 402S Main Street, Mount Pleasant, TN 38474

Keeping up with the exterior maintenance of a home can be a daunting task, and many consumers rely on the expertise of somebody who is properly trained and licensed to provide such services.



Nearly a dozen consumers in Columbia Tennessee and surrounding areas thought they could trust A-1 Exteriors to get the job done, but most were left with incomplete work - roof repairs remain unfinished, siding was not hung, gutters remain in despair, and more. Others report failure of the company to honor warranty work, and some indicate additional damage was caused as a result of poor workmanship. BBB's investigation also revealed this company is not properly licensed to offer many of the services contracted for. This is definitely a business Middle Tennessee can do without!

(http://www.bbb.org/nashville/business-reviews/oil-land-leases/royal-energy-of-tennessee-in-nashville-tn-37079286)**Royal Energy of Tennessee LLC (http://www.bbb.org/nashville/business-reviews/oil-land-leases/royal-energy-of-tennessee-in-nashville-tn-37079286) – BBB Rating: F**
(800) 619-9080 – 424 Church St., Fifth Third Center, Suite 2000, Nashville, TN 37219
http://www.royaloilleasing.com



Would you like to make thousands of dollars in monthly revenues from existing oil and gas well leases? Royal Energy of Tennessee LLC says they "have 40 years of experience and know how" in buying and selling existing mineral rights, mineral leases or working interest in producing oil and gas wells and properties. By investing in their royalty interest offer, investors can expect over 50% annual ROI with payment to occur within two years. Sound too good to be true?

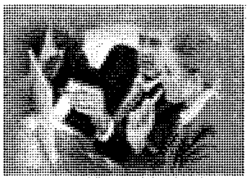
BBB's investigation revealed many troubling issues – the advertised wells have never been in production, the company is not licensed to sell securities, has never been located at 424 Church St, and has failed to substantiate advertised claims. Red Flags are all over this too good to be true offer!

US Freedom Foundation, LLC (http://www.bbb.org/nashville/business-reviews/paralegals/us-freedom-foundation-in-madison-tn-37044320) – BBB Rating: F
(615) 615.865.0919 – P.O. Box 232, Madison, TN 37115

What would you do if a loved one were thrown behind bars and needed your help? It's a difficult situation to be in. Many consumers would hire a professional to assist with the case, but BBB warns consumers to steer clear of US Freedom Foundation.

BBB files contain numerous serious complaints alleging consumers paid the company hundreds, and sometimes thousands, in advance for assistance with sentence reductions or other court related services, but the company failed to complete the services as agreed upon. The Supreme Court of Tennessee issued an order temporarily suspending the law practice license for the attorney who worked with US Freedom Foundation and is currently seeking a petition for discipline against him for "ethical misconduct and violations of rules of professional conduct."

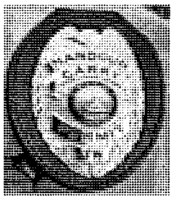
(http://www.bbb.org/nashville/business-reviews/computers-hardware-software-and-services/technetmicrocom-in-nashville-tn-37079955)**TechNetMicro.com (http://www.bbb.org/nashville/business-reviews/computers-hardware-software-and-services/technetmicrocom-in-nashville-tn-37079955)– BBB Rating: F**
(888) 242-1602 – 401 Commerce St., Nashville, TN | 9160 Hwy 53, Ste 12, Unit 333, Lakeland, TN | 312 S Fourth St., Louisville, KY 37201
http://www.technetmicro.com



TechNetMicro.com claims to be "a leading software distributor and retailer" offering consumers online access to computer software programs, such as Microsoft Office, Adobe Photoshop, and Windows 8 downloads. Their website boasts about providing "customers the guaranteed best prices, the guarantee of providing only legitimate software, along with the industry's best customer service," but complaints on file with BBB outline a very different experience.

This company has earned an F rating based on complaints alleging the software products did not work, disks were blank, key codes for activation of the software were incorrect or already redeemed, and difficulty contacting the company for assistance or refunds. BBB's research further indicates the company is not located at the advertised address in Nashville, the return address in Lakeland, TN is non-existent, and the address in Louisville, KY is a virtual office. Looks like this company's guarantee of legit software and "best" customer service have disappeared along with their customer's money and promised products.

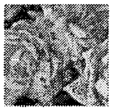
(http://www.bbb.org/nashville/business-reviews/self-defense/carrying-concealed-weapons-association-in-murfreesboro-tn-4100777)**Carrying Concealed Weapons Association (http://www.bbb.org/nashville/business-reviews/self-defense/carrying-concealed-weapons-association-in-murfreesboro-tn-4100777) - BBB Rating: F**
(615) 869-8345– PO Box 11543, Murfreesboro, TN 37129
www.LegallyArmed.com



The Right to Bear Arms is one of our constitutional rights that many gun owners take to heart, and with owning a gun comes much responsibility. Carrying Concealed Weapons Association offers services that could assist with knowing your rights and obligations as a gun owner, such as handgun carry permit seminars and manuals, ID pouches, travel guides, wallets and more, but before jumping too quickly to order that wallet for your gun permit, BBB has a warning for you.

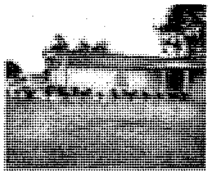
Carrying Concealed Weapons has developed a pattern of complaint alleging failure of the company to deliver products that were paid for in advance. When trying to reach the company to resolve complaints directly, consumers indicate the company was unreachable. Looks like the only thing this company is good at is concealing its customer's money and products.

Summerstone Nursery, Inc (http://http://www.bbb.org/nashville/business-reviews/nurseries-plants-trees/summerstone-nursery-in-morrison-tn-37039832) – BBB Rating: F
(931) 668.7991 – PO Box 274, Morrison, TN 37357
www.summerstonenursery.com



BBB has issued numerous warnings regarding the business practices of Summerstone Nursery, owned and operated by Sam and Melinda Womack. Hundreds of consumers have complained they paid for live trees and plants; however, all they received were dry, dead sticks. The Womacks also operate USA Seed Store (931.815.7333 – www.USASeedStore.com) that also maintains an F rating due to similar complaint issues.

TRX Software Development Inc (http://www.bbb.org/nashville/business-reviews/computer-software-publishers-and-developers/trx-software-development-in-murfreesboro-tn-37017600) – BBB Rating: F
(855) 880.1040 – 906 Dashiel Street Murfreesboro, TN 37129
http://www.trxsoftware.com



TRX Software Development continues to be a tax preparer's nightmare. BBB warned tax preparation consultants in early 2013 of this company's faulty tax preparation software; however, BBB's complaint file has grown to over 225 complaints since then.

BBB has recently learned that the company is selling the same tax software under the name "Over the Top Technologies," which is also the subject of similar complaints.

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When in Doubt, remember to **check with BBB** for information on businesses you can TRUST by visiting www.bbb.org/nashville (http:/www.bbb.org/nashville)

ABOUT the BBB
For more than 100 years, Better Business Bureau has been helping people find businesses, brands and charities they can trust. In 2015, people turned to BBB more than 172 million times for BBB Business Reviews on more than 5.3 million

businesses and Charity Reports on 11,000 charities, all available for free at bbb.org (http://bbb.org/).

There are over 100 local, independent BBBs across the United States, Canada and Mexico, including BBB Serving Middle TN and Southern KY, which was founded in 1961 and serves 38 counties in Middle TN and 7 in Southern KY.

BBB Directory (http://www.bbb.org/bbb-locator/)

Give.org (http://www.give.org/)

Council of Better Business Bureaus (http://www.bbb.org/council/)

BBB Business Partner Code (http://www.bbb.org/bbb-business-partner-code-of-conduct/)

BBB API (http://developer.bbb.org)

Terms of Use (http://www.bbb.org/nashville/get-to-know-us/terms-of-use/)

Trademarks (http://www.bbb.org/bbb-trademark-information/)

Privacy Policy (http://www.bbb.org/nashville/get-to-know-us/privacy-policy/)

Fight Phishing (http://www.bbb.org/nashville/get-consumer-help/fight-phishing/)

Select Language ▼

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EXHIBIT 5

45 counties of Middle Tennessee and Southern Kentucky

Change Location

enu

THIS BUSINESS IS NOT BBB ACCREDITED

US FREEDOM FOUNDATION, LLC

Reviews & Complaints

View Customer Reviews [0] **View Customer Complaints [8]**

SORT BY: Customer rating Most helpful Date

Customer Complaints Summary

8 complaints closed with BBB in last 3 years | 0 closed in last 12 months

Complaint Type	Total Closed Complaints
Advertising / Sales Issues	1
Problems with Product / Service	7
Billing / Collection Issues	0
Delivery Issues	0
Guarantee / Warranty Issues	0
Total Closed Complaints	**8**

The business failed to respond to the dispute. (4 complaints)

03/03/2014 Problems with Product / Service

Complaint

I paid ****** ********** to represent my husband in filing a **** motion on his behalf.
This is in reference to my husband ****** ******** #XXXXX-XXX who is currently still incarcerated. *** **** I talked with a **** ***** from ******* ********** about the services they had to offer. He explained (Show More of Complaint)

Desired Settlement

*****

03/03/2014 Problems with Product / Service

Complaint

**** ***** fraudulently represented to me that ******* ********** and **** K ***** ********** were my son's counsel in filing motion *****
**** **** contacted **** *****, ******* ********** from solicitation materials they provided my son, **** ******* who at that time was an inmate at *** *** in (Show More of Complaint)

Desired Settlement

As **** ***** fraudulently misrepresented himself, **** ********** and ******* ********** and accepted payment for services that he could not provide because there was no attorney on staff of ****** ********** capable of filing motions as was represented to me, and did not render those services but (Show More of Desired Settlement)

03/03/2014 Problems with Product / Service

Complaint

I mr. ****** is the father of ******* which in ************** in the state of********* i havent been able to contact the *********** office in *** ****** **** IS **** ***** OFFICE IN ************* ***

Desired Settlement

JUST NEED TO NO WHATS GOING ON **** ** *** ****

Read More Complaints: << < 1 2 3 > >>

BBB is unable to locate the business. (4 complaints)

11/13/2015 Problems with Product / Service

Complaint

Foundation played on my emotions. Took $3,000 of hard earned money. Lawyers could help get reduction in son's 37 year sentence. Foundation took $3,000 and did not provide legal services.

Desired Settlement

I want my money back; the folks at the Foundation should be punished for their crime.

04/02/2014 Problems with Product / Service

Complaint

I paid the Foundation 6000.00 to file paperwork in the Federal court. They didn't file anything and now cant get a hold of them
I have paid the foundation 6000.00 to file paperwork for a friend in the federal prison. No papers were ever filed nor can I reach them by email or by phone. The amount was (Show More of Complaint)

Desired Settlement

I would like a full refund for the services I have never received.

03/17/2014 Problems with Product / Service

Complaint

I hired attorneys to represent son in legal matter,I made monthly payments but lost contact with company before i could make the last few payments
We enterd agreement in *** **** **** between **** ** *********(my son)and K. ***** ********** of the ******* *********** ***** We began payment for legal (Show More of Complaint)

Desired Settlement

I want the retainment fee as well as the total amount I have paid up to this point for breach of contract.

Read More Complaints: << < 1 2 3 > >>

BBB Business Profiles may not be reproduced for sales or promotional purposes.

BBB Directory (http://www.bbb.org/bbb-locator/)

Give.org (http://www.give.org/)

Council of Better Business Bureaus (http://www.bbb.org/council/)

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